STATE OF MICHIGAN

IN THE SUPREME COURT

MENARD, INC.,

Petitioner/Appellant,

v

CITY OF ESCANABA,

Respondent/Appellee.

Supreme Court No. 154062

COA Docket No. 325718

Michigan Tax Tribunal
Docket Nos. 441600 and
14-001918 (Consolidated)

_____/

Carl Rashid, Jr. (P23915)
DYKEMA GOSSETT, PLLC
Attorneys for Petitioner/Appellee
400 Renaissance Dr. West
Detroit, MI 48243
(313) 568-5422

Jack L. Van Coevering (P40874)
Laura J. Genovich (P72278)
FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Plaintiffs/Appellants
1700 East Beltline Avenue, NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200

_____/

APPELLEE CITY OF ESCANABA'S SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

BASIS FOR SUPPLEMENTAL BRIEF

Appellant/Petitioner, Menard, Inc. ("Menard"), filed an Application for Leave to Appeal to this Court from the May 26, 2016 published *per curiam* opinion of the Court of Appeals (Talbot, CJ, and Hoekstra and Shapiro, JJ). *Menard, Inc v City of Escanaba*, 315 Mich App 512 (2016). Appellee/Respondent, the City of Escanaba ("City"), opposed the Application. In an Order dated February 1, 2017, this Court issued an Order directing the Clerk to schedule oral argument on the Application and requiring the parties to file supplemental briefs addressing the following issues:

(1) whether the Court of Appeals exceeded its limited appellate review of a decision of the Michigan Tax Tribunal; and, if so,

(2) whether the Michigan Tax Tribunal may utilize a valuation approach similar to that recognized in *Clark Equipment Company v Leoni Twp*, 113 Mich App 778 (1982) **(Exhibit A).**

Appellee timely submits this Supplemental Brief to address these issues.

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals apply the proper standard of review when it held that the Tax Tribunal's decision constituted an error of law and was not supported by competent, material, and substantial evidence on the record?

Appellant will answer:	No.
Appellee answers:	Yes.
The Court of Appeals would answer:	Yes.

II. May the Michigan Tax Tribunal may utilize the cost-less-depreciation valuation approach recognized in *Clark Equipment****Error! Bookmark not defined.Error! Bookmark not defined.***, when there is a limited market for the subject property?

Appellant will answer:	No.
Appellee answers:	Yes.
The Court of Appeals would answer:	Yes.

STATEMENT OF FACTS

The City incorporates by reference the Statement of Facts set forth in its Answer to Application for Leave to Appeal.

INTRODUCTION

This Court has requested supplemental briefs concerning the scope of the Court of Appeals' appellate review of decisions of the Michigan Tax Tribunal ("Tribunal") and whether the Tribunal may use the cost-less-depreciation approach described in *Clark Equipment*, which related to property for which a limited market exists.

As explained below, the Court of Appeals did not exceed the scope of permitted appellate review. The Court of Appeals found that the Tribunal's selection of a valuation approach constituted a legal error and that the Tribunal's decisions concerning the impact of certain deed restrictions and functional obsolescence were not supported by competent, material and substantial evidence on the record. These findings were squarely within the scope of the constitutional standard of review prescribed for the Tribunal and were also consistent with the Tribunal's statutory duty to make an independent determination of value.

With regard to the valuation method, the Court of Appeals' decision in *Clark Equipment*, *infra*, involved unique facts but ultimately stood for an uncontroversial principle: that the cost-less-depreciation approach is appropriate when there is a limited market of comparable sales and when using suspect comparable sales would yield a speculative and inaccurate value. That principle remains viable today and is consistent with standard appraisal practices. *Clark Equipment* does *not* stand for the proposition that property can be valued based on its "value in use," as Menard contends. Thus, the Court of Appeals did not err by citing *Clark Equipment*, and the Court of Appeals' decision should stand undisturbed.

ARGUMENT

I. The Court of Appeals did not exceed the scope of appellate review of the Tribunal's decision.

A. Summary of the Court of Appeals' Opinion

In its Opinion, the Court of Appeals enunciated the standard of review as follows:

> In the absence of fraud, our review of Tax Tribunal determination is limited to determining whether the tribunal made an error of law or adopted a wrong legal principle. *Meijer, Inc. v City of Midland,* 240 Mich App 1, 5; 610 NW2d 242 (2000). "The tribunal's factual findings are upheld unless they are not supported by competent, material and substantial evidence." *Id.* "Substantial evidence is evidence that a reasoning mind would accept as sufficient to support a conclusion." *Kotmar, Ltd v Liquor Control Comm,* 207 Mich App 687, 689; 525 NW2d 9212 (1995). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of th the evidence." *Jones & Laughlin Steel Corp v City of Warren,* 193 Mich App 348, 352-353; 483 NW2d 416 (1992). Failure to base a decision on competent, material and substantial evidence constitutes an error of law requiring reversal. The entire record, not just the portions that support the agency's findings, must be reviewed when evaluating the tribuanl's final determination. *Stege v Dep't of Treasury,* 252 Mich App 183m, 188; 651 NW2d 164 (2002) Further cursory rejection of evidence is also erroneous. *Jones & Laughlin Steel Corp,* 193 Mich App 348, 354. (COA Op at 9-10.)

The Court of Appeals reversed the Tax Tribunal's decision and remanded the case to the Tribunal for additional fact-finding in two areas:

> [T]he tribunal shall take additional evidence with regard to the market effect of the deed restrictions.
>
> * * *
>
> The tribunal shall also allow the parties to submit additiona evidence regarding the cost-less-depreciation approach. (COA Op at 28.)

The Court of Appeals then directed the Tribunal to "make an independent determination of the property's TCV [true cash value] using correct legal principles." *Id.*

Specifically, the Court of Appeals found four errors with the Tribunal's decision. The Court first held that Tribunal erred **as a matter of law** when the Tribunal failed to value the subject property at its highest and best use:

> The tribunal did not value the subject property at its HBU [highest and best use], an owner-occupied freestanding retail building, but instead valued it as a former owner-occupied freestanding retail building that could no longer be used for its HBU and could best be used for redevelopment for a different use. In doing so, the [tribunal] **made an error of law by failing to value the subject property at its HBU.** (COA Op at 18, emphasis added.)

Second, the Court of Appeals held that the Tribunal's conclusion that the anti-competitive deed restrictions had no impact on the sale price was not supported by competent, material and substantial evidence. (COA Op at 16.) The Court of Appeals found it was an error of law for the Tribunal to base its decision on oral testimony that was unsupported by any market analyses or evidence demonstrating how the market would treat the deed restrictions.

Third, the Court of Appeals found that the Tribunal made errors of law and adopted a wrong principle when it rejected the cost-less-depreciation approach given the "limited evidence as to whether there is a market for big-box stores at the subject property's HBU." (COA Op at 19.) Instead, under *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473; 473 NW2d 636 (1991), the Tribunal should have considered multiple valuation methods.

Finally, the Court of Appeals found error in the Tribunal's rejection of the cost-less-depreciation approach based on the allegation that the subject property was functionally obsolete, concluding as follows:

> There was no evidence in the record of any deficiency in the subject premises that would inhibit its ability to property function as an owner-occupied freestanding retail building. (COA Op at 26.)

In making these findings and reversing the matter for further proceedings, the Court of Appeals did not exceed the proper scope of appellate review.

B. Standard of Review of Tribunal Decisions

1. The Tribunal's decision may be overturned if the Tribunal makes an error of law or adopts a wrong principle.

Under the Michigan Constitution, Tribunal decisions are subject to the following standard of appellate review:

> In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

Const 1963, art VI, § 28.

An "error of law" can mean an error in the interpretation or application of a statute, which the appellate courts review *de novo.* *Forest Hills Co-operative v City of Ann Arbor*, 305 Mich App 572, 587; 854 NW2d 172 (2014) (reviewing *de novo* the Tribunal's interpretation of MCL 211.27). An "error of law" also includes a decision that is not supported by competent, material, and substantial evidence on the whole record. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 388; 576 NW2d 667 (1998). Factual findings are conclusive if supported by competent, material, and substantial evidence. *Danse Corp v City of Madison Heights*, 466 Mich 175, 178; 644 NW2d 721 (2002).

Although the phrase "competent, material, and substantial evidence" is often quoted as one standard, it in fact encompasses three distinct standards. **"Competent"** evidence tests the factual evidence underlying testimony, as this Court has recognized:

> Opinions or conclusions normally are not considered competent evidence unless they relate to matters beyond the ken of the fact finder, unless they are offered in the form of the opinion of an expert, **and unless the factual basis for the expert's opinion is supported in all essential respects by some evidence. This is not a matter of credibility; it is a matter of competence** and, therefore, goes to the admissibility of the opinion evidence for any purpose.

Fisher-New Center Co v Mich State Tax Comm, 380 Mich 340, 381; 157 N2d 271 (1968) (emphasis added).

"Material" evidence tests the **relevance** of the evidence to the issue in controversy. *People v Stanaway*, 446 Mich 643, 725; 521 NW2d 557 (1994); *see also People v Oliphant*, 399 Mich 472, 488-89; 250 NW2d 443 (1976).

"Substantial" evidence tests the **amount** of evidence; evidence is "substantial" if a reasonable person would accept it as being sufficient to support a conclusion, and it must be more than a "mere scintilla." *County of Wayne v Mich State Tax Comm'n*, 261 Mich App 174, 187; 682 NW2d 100 (2004), *citing In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994); *see also Inter Co-Op Council v Dep't of Treasury*, 257 Mich App 219; 668 NW2d 181 (2003). Applying the substantial evidence test must not be "mechanical" or operate on a "calculus," but rather must look at whether the inferences below were "legitimate and supportable." *In re Payne*, 444 Mich at 691, 694 n 8.

A decision of the Tribunal that is not supported by evidence that meets all three standards – *competent*, *material*, and *substantial* – is an error of law that must be reversed on appeal. *See Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 388.

2. The Tribunal must make an independent determination of value.

In addition to the constitutional standard of review discussed above, the Tax Tribunal Act also requires the Tribunal to make an independent determination of value. MCL 205.35, MCL 205.35a, MCL 205.37. Regardless of the evidence presented by the parties, this Court and the Court of Appeals have repeatedly required that the Tribunal consider multiple valuation methods and determine the most accurate method to reach an independent determination true cash value. *Antisdale v City of Galesburg*, 420 Mich 265, 276-277; 362 NW2d 632 (1985); *Meadowlanes*

Ltd Dividend Housing Ass'n, 437 Mich at 502-503; *Edward Rose Building Co v Independence Twp*, 436 Mich 620, 432-434; 462 NW2d 325 (1990); *Forest Hills Corp v City of Ann Arbor*, 305 Mich App 572, 587; 854 NW2d 172 (2014); *President Inn Properties, LLC v City of Grand Rapids*, 291 Mich App 625, 639-643; 806 NW2d 342 (2011); *Great Lakes Div. of Nat'l Steel Corp*, 227 Mich App at 398, 401, 409, 413; *Jones & Laughlin Steel Corp v Warren*, 193 Mich App 348; 483 NW2d 416 (1992); *Teledyne Continental Motors, Inc v Muskegon Tp*, 163 Mich App 188, 193; 413 NW2d 700 (1987).

These cases further reiterate this Court's directive that "all three approaches [to value] should be used whenever possible," that the values be reconciled and weighed, and that the valuation analysis result in a "well-supported conclusion that reflects the study of all factors that influence the market value of the subject property." *Meadlowlanes Ltd Dividend Housing Ass'n*, 437 Mich at 485-486, 501-504.

The Tribunal also has a second statutory duty under Section 51 of the Tax Tribunal Act to separately provide findings of fact and conclusions of law. MCL 205.51. This provision requires the Tribunal's decision to contain a sufficient factual and legal basis to facilitate appellate review. *Great Lakes Div. of Nat. Steel Corp.*, 227 Mich App at 401-402; *Almira et al v Benzie County Tax Allocation Bd.*, 80 Mich App 755, 761; 265 NW2d 39 (1978); *see also Nunn v George A. Contrick Co*, 113 Mich App 486; 317 NW2d 331 (1982).

Because of the Tribunal's independent statutory obligations, appellate courts have frequently reversed and remanded property tax appeal cases for additional fact finding – *see Jones & Laughlin*, 193 Mich App at 356 – and for the consideration of additional valuation approaches, calculations, and analysis. *See Meadowlanes Ltd Dividend Housing Ass'n*, 437 Mich at 502-503.

3. Appellate courts must review the "whole" record.

Importantly, the appellate courts "review a final agency determination on the basis of the entire record, not just portions that support the agency's findings." *Stege v Dep't of Treasury*, 252 Mich App 183, 188; 651 NW2d 164 (2002). **The appellate court must consider "the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency."** *Romulus v Mich Dep't of Envtl Quality*, 260 Mich App 54, 84; 678 NW2d 444 (2003) (emphasis added), *quoting Mich Emp Relations Comm v Detroit Symphony Orchestra, Inc*, 396 Mich 116, 124; 223 NW2d 283 (1974).

In this regard, this Court has held that the "substantial evidence" standard requires that the appellate court review the whole record:

> The cross-fire of debate at the Constitutional Convention imports meaning to the "substantial evidence" standard in Michigan jurisprudence. What the drafters of the Constitution intended was a thorough judicial review of administrative decision, a review which considers the whole record -- that is, **both sides of the record -- not just those portions of the record supporting the findings of the administrative agency.** Although such a review does not attain the status of de novo review, **it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency.**

Mich Emp Relations Comm, 393 Mich at 124 (emphasis added).

In sum, a decision of the Tax Tribunal constitutes a reversible if the Tribunal adopted a wrong principle or erred as a matter of law. An "error of law" may also exist if the Tribunal's factual findings are not supported by evidence that is competent, material, and substantial. This means that expert witness testimony must be supported by record evidence, and the appellate courts must review the *entire* record to conduct a "qualitative and quantitative evaluation" of the evidence considered. *See Mich Emp Relations Comm*, *supra.* This consideration of the whole record is even more critical in light of the Tribunal's duty to independently determine value. With this standard in mind, we turn to the Court of Appeals' review of the Tribunal's decision in this case.

C. The scope of appellate review was not exceeded in this case.

As discussed *infra*, the Court of Appeals identified four errors in the Tribunal's decision. The Court of Appeals did not exceed the standard of review in finding those errors.

1. *The Tribunal committed a legal error by failing to value the subject property at its highest and best use.*

Central to this case – and the "dark store" theory broadly – is Menard's reliance on the sales comparison approach using "comparable" properties that are encumbered with self-imposed, deed restrictions. The Court of Appeals held that by relying on the deed-restricted comparables, the Tribunal failed to value the subject property at its highest and best use.

At the outset, this Court should note that it has previously reversed a decision of the Tax Tribunal based on the use of a particular valuation method. *Edward Rose*, 436 Mich at 620. In *Edward Rose*, which concerned the taxable value of 100 vacant residential lots, the Tribunal "discounted" the market value of the lots based on their potential "bulk" sale. *Id.* at 628. The Court of Appeals reversed the Tribunal based on its "discount" analysis, finding the analysis to be "fundamentally unfair." *Id.* at 629.

This Court granted leave to appeal and affirmed the Court of Appeals' decision. This Court cited the constitutional standard of review discussed above, but held that "**[d]espite this deferential standard of review,** we conclude under the present circumstance that the Tax Tribunal adopted a wrong principle in discounting the individual lot values by a factor of eighteen percent. **The tribunal's valuation of petitioner's property utilizing a wholesale discount was an improper method of valuation which distorted the fair market value of the property.**" *Id.* at 632 (emphasis added). This Court specifically found that the valuation method (discount) applied by the Tribunal did not value the subject property at its highest and best use. *Id.* at 635.

The same is true here: the Tribunal erred in applying the sales comparison approach and failed to value the subject property at its highest and best use. As it did in *Edward Rose*, this Court should, "despite the deferential standard of review," affirm the Court of Appeals' decision reversing the Tribunal's erroneous holding. *See Edward Rose, supra* at 632.

The Court of Appeals emphasized the fundamental importance of the property's highest and best use in its decision:

> To determine true cash value, *the property must be assessed at its highest and best use.* The concept of highest and best use recognizes that the use to which a prospective buyer would put the property will influence the price that the buyer would be willing to pay for it. The concept is fundamental to the determination of true cash value. *COA Op* at 6 (emphasis in original).

Despite the importance of the property's highest and best use, Menard's appraisal relied on properties that could *not* be used for the same highest and best use as the subject property. Menard agreed that the subject property's highest and best use was its continued use as a free-standing retail building, without any conversion or remodeling to an alternative use. However, five of the eight "comparable" sales in Menard's appraisals involved properties in which future "big-box" retail use was prohibited by anti-completive deed restrictions. Consequently, none of those five comparable properties were sold for future retail use; rather, they were converted, as required by the deed restriction, to industrial or other non-retail uses.[1]

As a result, the Court of Appeals found that "the anti-competitive nature of the deed restriction means that the deed-restricted comparables ***could not be sold for their HBU***. The potential buyers of the comparables were therefore limited to buyers willing to accept the use

[1] The properties that were sold consisted of three factories, a city hall, a multi-tenant strip mall, a furniture store, a rental property, and property that was vacant since 2011 and for which no use was known or projected; two of these sales were foreclosures. None were unencumbered, owner-occupied, freestanding retail buildings. Menard Appraisal, pp 85-100.

restrictions" and use the property for a non-commercial purpose. *COA Op*, 8 (emphasis added). The Court of Appeals therefore held that the Tribunal failed to value the subject property (which was *not* encumbered by a deed restriction) at its highest and best use, **which was an error of law**:

> The tribunal did not value the subject property at its HBU, an owner-occupied freestanding retail building, but instead valued it as a former owner-occupied freestanding retail building that could no longer be used for its HBU and could best be used for redevelopment for a different use. **In doing so, the trial court made an error of law by failing to value the subject property at its HBU.** *COA Op.* 8 (emphasis added).

The Court of Appeals did not exceed the scope of appellate review by finding this error of law. To the contrary, the Constitution specifically allows the appellate courts to review a decision of the Tribunal for an "error of law." *See* Const 1963, art 6, § 28.

The Court of Appeals' finding of an error of law was well-founded. Although the Tribunal was aware of the deed restrictions, the Tribunal did not make any adjustments to account for the deed restrictions, even though the anti-competitive limits on the property would likely affect value, as the Court of Appeals recognized:

> Deed restrictions that limit the ability of prospective buyers to use the comparable properties for the subject property's HBU necessarily limit, if not eliminate, the willingness of those buyers to purchase the restricted property. **Those who would be interested in buying the property with restrictions would need to make modifications to convert the building from retail to something else, like industrial use. Given the need to convert, the buyers would necessarily pay a lower price.** *COA Op,* 8 (emphasis added).

Stated differently, the "comparable" sales were not truly comparable to an *owner occupied, free standing, retail building* used for "big box retail." Under well-established Michigan case law,[2] the comparable sales used in this case were impermissible ***as a matter of law***. The Court of Appeals was therefore correct in holding that the Tribunal erred as a matter of law, much like this Court held in *Edward Rose*. In making that determination, the Court of Appeals did not undermine any factual findings of the Tribunal or make any weight or credibility findings. Rather, this issue involved an error of law and was appropriately reviewed as such by the Court of Appeals.

2. The Tribunal's acceptance of deed-restricted comparables was not supported by competent, material, and substantial evidence on the whole record.

In addition to the Court of Appeals' finding that the Tribunal made an error of law by not valuing the subject property at its highest and best use, the Court of Appeals also found that the Tribunal's decision was not supported by competent, material, and substantial evidence on the whole record, and properly remanded the case on that basis as well.

a. Petitioner's appraiser's testimony was not "competent" or "substantial" evidence.

As discussed above, expert testimony is not "competent" unless it is supported "in all essential respects" by evidence. *Fisher-New Center Co*, 380 Mich at 386. Here, Menard relied on the sales comparison approach, citing eight "comparable" property sales to establish the true cash value of the subject property. Of the eight sales comparables used by Menard's appraiser, five had anti-competitive deed restrictions prohibiting future retail use, and two were the subjects of forced sales. Consistent with the deed restrictions, the sales consisted of three factories, two strip malls, a city hall, and an investment property. Only two—Improved Sale 6 and Improved

[2] *Edward Rose Bldg Co*, 436 Mich at 620; *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676; 840 NW2d 168 (2013).

Sale 7—were sold without deed restrictions and were not forced sales, which resulted in a substantially higher price per square foot among the eight properties used.

The record lacks any evidence of the market's treatment of deed restrictions generally or of other freestanding owner-occupied big box retail stores. Menard's appraiser (Torzewski) began his discussion of the "Metropolitan Detroit Big Box Retail Market," a discussion largely focused on a table of sale prices taken from a real estate broker's (Cushman Wakefield) annual report. Absent from his discussion was any description of the properties necessary to determine whether they were comparable – that is, Torzewski did not include information concerning size, use, configuration, construction, or any description of the transactions (i.e., whether the properties were deed-restricted, foreclosures, or in bankruptcy). Menard Appraisal, p. 20.

Torzewski then evaluated "leased fee," non-owner occupied retail spaces, again without a description of the property size, whether the properties were freestanding, or whether the transactions were deed-restricted. Menard Appraisal, pp. 21-22. He described these properties as "first generation built to suit properties," which he explained as follows:

> A national retailer will develop a store, move in and start operations. The retailer will draft a long-term, internal lease that reflects its development costs. The retailer sells the property to an investor, with the long term lease in place, in a sale leaseback transaction. Menard Appraisal, p. 20.

The Appraisal then compared "leased, second generation space" in which the purchaser bought the property in remaining income stream from an existing lease. *Id.*

Finally, Torzewski provided a list of "Fee Simple Transactions," taken from another real estate company's (CoStar) report, again, without a description of any of the property (i.e. size, age, use, configuration as freestanding, or whether the properties were big box retail, etc.) and without any of the conditions of the sales (i.e. deed-restricted, sale-leaseback, foreclosures, investor sales, etc.) Menard Appraisal, p. 23. In none of the data, whether assembled by other

companies or by Torzewski, was there ***any*** reference to owner-occupied freestanding big box stores sold without deed restrictions to other big box retailers, such as sales of K-mart stores to Wal-Mart and Meijer, or former Circuit City stores sold to Cabela's.

None of Torzewski's supposed "market data" addressed big box store sales, and none attempted to document an "industry-wide practice" concerning deed restricted properties. The Tribunal acknowledged as much, noting that the market analysis was not exclusively big box sales data. (Opinion and Judgment at 15.) Without any supporting data indicating that the market analysis included *any* owner-occupied freestanding big box retail space, sold as originally constructed, the Tribunal nonetheless found that the comparable data was "supported by sales data within the market analysis" of the Menard's appraisal. (Opinion and Judgment at 16.)

In making that decision, the Tribunal relied on Torzewski's testimony that in his opinion, "the restrictions that were in place aren't anything really out of the ordinary or would affect the secondary user of the property." *Hearing Transcript*, pp 47-48. Torzewski made no adjustments for the difference in property rights involved in the "comparable" sales that he selected and disregarded the deed restrictions simply because he was told by the parties involved in those sales that the restrictions did not have any effect on the sale price. P-1, p 39; *HT*, pp 65, 90.

The Court of Appeals found that Torzewski's assertion that the deed restrictions had "no effect" on value was not supported by the record:

> Although Torzewski [Menard's appraiser] testified that he considered the deed restrictions, **the record is insufficient to support his assertion that they had no effect on the sales price for the restricted comparables.** His testimony is that he consulted the brokers, sellers, and buyers of the comparables. Thus, **that testimony is only sufficient to establish that <u>to the parties involved in the actual transaction</u>, the deed restrictions did not affect the sales price they were willing to pay.** In other words, the market for sale was limited to those purchasers who were

> willing to accept the restrictions and so did not reflect the full value of the unrestricted fee simple.
>
> * * *
>
> **On this record, there is no evidence to account for the impact of the deed-restricted properties being sold for purposes other than the HBU of the subject property.** It is plain that no adjustments were taken for this major difference in the subject property and the restricted comparables. Accordingly, we conclude that the tribunal erred in finding Menard's sales-comparison approach meaningful to its determination of the subject property's TCV. *COA Op*, 7-8 (emphasis added).

The Court of Appeals' conclusion is correct. Menard offered ***no market analysis*** of any sales of property comparable to the highest and best use of the subject property as an owner-occupied, freestanding big box retail stores, sold without modification. Menard offered ***no evidence*** of how the deed restrictions impacted the value of the comparable properties in the market (*i.e.*, beyond the professed impact on the actual buyers, who converted the buildings to other uses). There was no evidence of how the deed restrictions would impact the market value in relation to purchasers who wish to engage in retail uses, which would be the highest and best use. There was no evidence of the cost to convert the deed-restricted properties to another use, which would impact sale price. Torzewski's testimony addressed only the parties involved in the so-called "comparable" transactions, and not to the market's treatment of such properties.[3] The record simply provides no evidence of a market for "big box" stores with anti-competitive deed restrictions.

Because Torzewski's testimony that the deed restrictions had "no effect" on value was unsupported by ***any*** evidence, his testimony was not "competent" (supported by evidence), nor

[3] Indeed, the record establishes that two comparables that were not subject to anti-competitive deed restrictions had ***higher*** sale prices than the five comparables that were encumbered by deed restrictions. This shows that contrary to Menard's theory, the deed restrictions did, in fact, have a detrimental impact on value, as one would logically expect.

was it "substantial" (sufficient for a reasonable person to accept its conclusion). The Tribunal nonetheless found the testimony "meaningful" to "his overall analysis" and adopted Menard's sales comparison approach on that basis. (*See* COA Op, 16.) The Tribunal's reliance on Torzewski's testimony resulted in a decision that was not supported by competent, material, and substantial evidence on the record, which was therefore an error of law. The Court of Appeals did not exceed the scope of appellate review in remanding the case for further fact finding.

b. The Court of Appeals did not make improper credibility findings.

When reviewing a decision of the Tribunal, the Court of Appeals cannot second-guess the Tribunal's determinations regarding weight or credibility of testimony unless those determinations are not supported by competent, material, and substantial evidence. *Thrifty Royal Oak, Inc v City of Royal Oak*, 130 Mich App 207, 228; 344 NW2d 305 (1983). But the Court of Appeals did not determine whether Torzewski's testimony was credible; the Court did not, for example, question whether Torzewski did in fact consult with the brokers, sellers, and buyers of the comparables. Rather, the Court of Appeals found that ***even with*** that testimony, the Tribunal did not have competent, material, and substantial evidence to support a finding that the deed restrictions did not affect value, because Torzewski's testimony was unsupported by any evidence. (COA Op, 8.) That is why the Court of Appeals directed that, on remand, the Tribunal "take additional evidence with regard to the market effect of the deed restrictions." *COA Op*, 12.

The fact that the Tribunal characterized the testimony as "consistent", "persuasive", or "meaningful" does not mean that the conclusion was supported by competent, material, and substantial evidence on the whole record, as argued by Menard. *App Lv*, 28; *see Romulus, supra* (appellate court must consider "the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency"). An agency

will always submit that the evidence on which it relies is "persuasive," but that does not mean that every decision is supported by competent, material, and substantial evidence.

Moreover, it is important to note that the Court of Appeals was not nitpicking at immaterial parts of Menard's case. Rather, Torzewski's testimony concerning the impact of the deed restrictions on value was central to the Tribunal's decision and resulted in the Tribunal ultimately failing to value the subject property at its highest and best use – which is, as the parties agreed, *big box retail* use. Without competent, material, and substantial evidence on that point, Menard's entire valuation theory collapses – which is precisely why the Court of Appeals remanded the case. In so doing, the Court of Appeals did not exceed the scope of its appellate review, and thus Menard is not entitled to relief from this Court.

3. *The Tribunal's finding of functional obsolescence was not supported by competent, material, and substantial evidence on the record.*

At the Tribunal, Menard's appraiser rejected the cost approach to valuation because he believed that functional obsolescence is built into "big box" stores and that such properties are also subject to external obsolescence, both of which he testified affect the value but which are difficult to analyze properly. *HT*, p 60. According to Torzewski, "[f]or the most part buyers of these properties just don't utilize the cost approach when they're looking to buy a property." *HT*, p 60; *see also* P-1, p 6. Torzewski did not provide supporting analysis or research as to why he believed the replacement cost approach was inappropriate. This contributed to Menard's – and the Tribunal's – erroneous reliance on the sales comparison approach, discussed above.

The Court of Appeals rejected the Tribunal's and Menard's blanket unsupported conclusion that the subject property had significant obsolescence that precluded use of the cost approach. The Court of Appeals specifically found that there was no evidence of functional obsolescence:

> **There was no evidence in the record** of any deficiency in the subject premises that would inhibit its ability to properly function as an owner-occupied freestanding retail building. The functional obsolescence to which Menard refers appears to be the fact that, due at least in part to self-imposed deed restrictions that prohibit competition, such freestanding retail buildings are rarely bought and sold on the market for use as such but are instead sold to and bought by secondary users who are required to invest substantially in the buildings to convert them into other uses, such as industrial use. However, as stated in *Clark*, to read MCL 211.27 "as requiring the taxing unit to prove an actual market for a property's existing use would lead to absurd undervaluations." *COA Op*, 11.

The Court of Appeals properly found no evidence supporting the supposed "obsolescence" in the property. Menard's Application likewise failed to identify ***any*** obsolescence and provided no clue as to how obsolescence would be determined.

In similar cases, the Court of Appeals has properly required evidence of functional obsolescence before rejecting the cost approach. In *Meijer, Inc. v City of Midland,* the Court of Appeals remanded the case for the Tribunal to make a determination of functional obsolescence. On remand, Meijer was unable to provide any market-supported evidence of the amount of functional obsolescence. See *Meijer, Inc v City of Midland (On Remand)*, 14 MTT 230 (Docket No. 190704), issued December 2, 2003. Similarly, in *Thrifty Royal Oak, supra*, the Court of Appeals affirmed the use of the cost approach to value a large, stand-alone, owner-occupied retail building because, as the Court of Appeals explained, "the lack of any reliable 'comparables' was by itself sufficient to demonstrate the unique character of the property and, in turn, to justify resort to a cost approach to valuation." *Thrifty Royal Oak*, 130 Mich App at 231. The Court of Appeals in that case found no obsolescence.

Here, consistent with *Thrifty Royal Oak* and *Meijer*, the Court of Appeals affirmed the potential applicability of the cost approach because of the limited or speculative real estate market for comparable property with the same highest and best use. Like the courts in the cases

discussed above, the Court of Appeals remanded the matter for the Tribunal to receive additional evidence to evaluate the cost approach.

Nothing in the Court of Appeals' analysis exceeded the bounds of the constitutional standard of review. The Court of Appeals found that "there was no evidence in the record" supporting a finding of functional obsolescence, and thus remanded the case for consideration of the cost approach. This analysis and remand fell squarely within the scope of the Court of Appeals' appellate review, and the Court of Appeals' decision should stand undisturbed.

II. The cost-less-depreciation method used in *Clark Equipment Co v Leoni Twp*, 113 Mich App 778 (1982), is an accepted appraisal method for limited market properties or for properties lacking reliable comparable sales data.

A. The cost-less-depreciation approach must be distinguished from a "value in use" theory.

Under the well-established definition of "true cash value," determination of "the usual selling price" of the subject property begins by determining the likely use of the subject property if it were sold. *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23; 737 NW2d 187 (2007). The buyer's likely use of the property is the property's "highest and best use." *Edward Rose Bldg Co*, 436 Mich at 639.

Menard confuses the "highest and best" use standard with what it describes as a prohibited "value in use" theory. The distinction between these concepts was explained by the Court of Appeals in *Huron Ridge* as follows:

> Petitioner has also failed to establish that the Tax Tribunal used an improper use-value approach to determine true cash value. Real property may not be assessed on the basis of the value of its use to the owner. **'Use value' refers the economic value of the use made by the property owner, regardless of whether it is the highest and best use. 'Highest and best use' recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay.** Here, petitioner does not dispute that the property is being put to its highest and best use as subsidized residential real estate. *Huron Ridge, supra* at 33; citations omitted.

Menard contends that a cost-less-depreciation approach cannot be used to value its property because it would constitute a "value in use." But Michigan courts have not prohibited the use of the cost-less-depreciation approach as, per se, a "value in use" theory. They have instead prohibited using a valuation approach that is not based on the subject property's highest and best use. Michigan courts have consistently and repeatedly approved using the cost-less-depreciation approach to determine the usual selling price both when comparable market information is lacking or speculative and to adjust, reconcile, weigh and evaluate comparable market information that is available. *See, e.g., Consumers Power Co v Big Prairie Twp*, 81 Mich App 120, 129-130; 265 NW2d 182 (1978); *Meadlowlanes Ltd Dividend Housing Ass'n*, 437 Mich at 501-504. Thus, there is a critical distinction between "value in use" and the cost-less-depreciation approach – but that distinction is blurred in Menard's argument, particularly as it relates to the *Clark Equipment* and *First Federal Savings & Loan* cases.

B. Menard misstates the relationship between *Clark Equipment* and *First Federal Savings & Loan*.

Menard erroneously argues that *Clark Equipment* permits using a "value in use" standard when no market exists. *Application*, p. 11. Menard's Application does not analyze the *Clark Equipment* decision or provide any citation to cases or other authority as to the meaning of "value in use"; instead, Menard provides its own flawed definition.

Menard defines "value in use" to be "the cost of improvements and alternatives regardless of whether such improvements or alterations affect the market value of the property." *Id.* This means, according to Menard, that the cost approach is inherently a value in use standard: "Depreciation must be calculated and deducted from the cost calculation (value in use) to convert it to market value (value in exchange)." *Id.* at 13. Menard further claims that *Clark*

Equipment's decision concerning "value in use" was "reversed" by this Court's decision in *First Federal Savings & Loan Ass'n v City of Flint*, 415 Mich 702; 329 NW2d 755 (1982).

Because Menard has not provided a source for its definition of "value in use," the City relies on the description provided by the *Appraisal of Real Estate*:

> In stark contrast to market value and fair value, **use value is the value a specific property has for a specific use.** In estimating use value, an appraiser focuses on the value the real estate contributes to the enterprise from which it is a part or the use to which it is devoted, ***without regard to the highest and best use of the property*** or the monetary amount that could be realized from its sale. …. The term *value in use* is often used by appraisers synonymously with use value, but the former term has specific meanings in other contexts which can cause confusion. *Appraisal of Real Estate* (14th Ed, 2013), p. 62 (emphasis added).

Importantly, *Clark Equipment* was not "reversed by" this Court's decision in *First Federal Savings & Loan.* Both cases fundamentally stand for an uncontroversial proposition: the cost-less-depreciation approach is an appropriate approach to determine the usual selling price of property, and identified items of depreciation must be supported in the record and valued at their usual selling price. Neither case mandates a particular calculation of obsolescence, i.e. that functional obsolescence must exist. The cases reject a "value in use" appraisal method (*Clark Equipment*) or do not address "value in use" (*First Federal Savings & Loan*). Instead, they both affirm the need for a valuation approach that is consistent with the property's highest and best use, which in both cases was the subject property's existing use. The factual question – the identification of items of obsolescence and the value of that obsolescence – was the reason both courts remanded the matters to the Tribunal.

*1. The Holding of Clark Equipment**Error! Bookmark not defined.***

In *Clark Equipment*, the parties agreed that the subject property's highest and best use was its continued use as a 770,000 square foot manufacturing plant. *Clark Equipment*, 113 Mich App at 782. To determine the true cash value, the Tribunal rejected the taxpayer's argument that

the sales comparison approach must be exclusively used to determine a market value and instead held that the proffered sales of other industrial properties were not comparable. Consequently, the Tribunal used the cost-less-depreciation approach.

On appeal, the taxpayer contended that only the sales comparison approach should be used because the cost-less-depreciation approach impermissibly valued the property "in use," and not its market value. *Clark Equipment, supra* at 782. In rejecting this argument, the Court of Appeals held that the property's current use remained its highest and best use despite the lack of sales of comparable properties. *Id.* at 785. However, the Court also identified two errors with the Tribunal's decision: the Tribunal's description of the cost-less-depreciation value as a "value in use" appraisal method, and the Tribunal's failure to support the depreciation allowance with evidence on the record. *Id.* at 784, 787.

Contrary to Menard's interpretation, the *Clark Equipment* court did not endorse a "value in use" appraisal methodology. Rather, it explicitly *rejected* such a valuation approach by finding that the Tribunal made a legal error by relying on what it called a "value in use" theory. *Id.* at 784. As well, the Court of Appeals rejected doctrinal arguments that the taxpayer advanced: that the cost-less-depreciation valuation method is, per se, a "value in use" method, and that only the sales comparison method measures the market value in exchange. *Id.* at 787.

Consistent with long-standing appraisal principles, the Court of Appeals further held that the sales comparison method should not be used when sales information was lacking, as it would not reflect the property's highest and best use, which was the property's "current use as a

manufacturing plant."[4] Given the taxpayer's agreement that the property's current use was the property's highest and best use in the market, the Court of Appeals concluded as follows:

> When a large corporate entity such as Ford or General Motors builds a factory, it is probable that absolutely no market exists for the resale of that factory consistent with its current use. It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost premised on value in use because, in actuality, such industrial facilities are rarely bought and sold. Thus, we hold that, to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists. *Clark Equipment*, 113 Mich App at 785.

The Court of Appeals did not reach any determination regarding the items or the amount of depreciation but remanded the matter to the Tribunal for calculation of the depreciation rate.

On remand, the parties did not interpret the Court of Appeals' decision as requiring a "value in use" theory, as the Tribunal summarized at the remand hearing:

> Petitioner's counsel perhaps stated the problem at hand best late in the remand hearing by saying, 'we are not valuing the value to Clark but are trying to determine how much someone would pay for the subject property. *Clark Equipment Co v Leoni Twp, (On remand)*, 3 MTT 234, 238 (1984).

[4] The Court of Appeals quoted the taxpayer's appraiser who, much like Menard's appraiser in this case, agreed the property's current use was also the property's highest and best use:

> The subject property was originally designed as a manufacturing plant and has been used for this purpose continuously since its conception. Although it has several obsolete design features, it is still modern enough to be considered for continued use for an industrial purpose. Moreover it is currently occupied and used as an industrial plant and it owner-occupant has expressed no desire to abandon the property even though recent adjustments have been made in employee levels and product lines. Based upon the consistency of use exhibited by the above factors, the subject's highest and best use was estimated to be consistent with its current use a manufacturing plant. *Clark Equipment*, 113 Mich App at 782-783.

The parties agreed to deductions for "all forms of depreciation," including physical, functional, and economic obsolescence, which resulted in a near 70% discount from the property's replacement cost new. *Clark Equipment Co v Leoni Twp (On remand)*, 3 MTT 234, 239 (1984). The "depreciation factor" referenced by the Court of Appeals plainly did not refer to physical depreciation alone.

Contrary to Menard's understanding of *Clark Equipment*, the Court of Appeals clearly endorsed a market valuation premised on highest and best use, not a "value in use" that focused on a value to the owner without regard to the property's highest and best. *Appraisal of Real Estate*, p. 62. Menard has thus misunderstood the import of *Clark Equipment* and used it erroneously to attack to the Court of Appeals' decision here.

2. Holding of First Federal Savings & Loan

Menard erroneously claims that the *Clark Equipment* decision was "reversed by" and is contrary to this Court's decision in *First Federal Savings & Loan*. Although Menard acknowledges that this Court recognized in *First Federal Savings & Loan* that the cost-less-depreciation method[5] can be used when there are no comparable sales or comparable rentals, Menard nonetheless argues that the cost-less-deprecation approach could only be used "if expenditures that 'merely enhance the image' or business of a property owner were discounted from historical cost (called 'functional obsolescence')." Menard's Reply Br. 3-4. Menard misstates this Court's holding in *First Federal Savings & Loan Ass'n*.

[5] Menard does not note that in *First Federal Savings & Loan*, the Tribunal used the owner's actual historical reproduction cost, not a market derived replacement cost. Reproduction cost is the cost to construct a replicate of the subject property, or, in *First Federal Savings & Loan Ass'n*, the owner's actual construction costs. See *Appraisal of Real Estate, 562, 569-570.* By contrast replacement cost is a market-derived estimate of the cost to construct a building a substitute with optimal utility. Use of this method eliminates some forms of functional obsolescence due to super-adequacies. *Id.* The City used the STC replacement cost method, which included market multipliers for location and a multiplier measuring sale prices. HT 145-149. She collected 8 comparable sales to validate her cost valuation. HT 134, 150-155.

In *First Federal Savings & Loan*, this Court reversed the Court of Appeals' decision, which had held that a renovated bank building was a unique property with a single viable purpose and must be valued based on the cost approach. 104 Mich App 609; 305 NW2d 553 (1981). This Court did not, however, reverse the Court of Appeals' underlying reliance on the appraisal principle permitting the use of the cost approach for limited market and special purpose properties,[6] nor did this Court prohibit consideration of "custom" or other features unique to the subject property.

Instead, this Court required a determination as to *how these identified unique features affected the usual selling price*.[7] In a collection of footnotes, this Court explained that an over-improvement "should be valued at the market value, not at what it costs," and that, even without an over-improvement, expenditures on any structure "do not necessarily enhance its value dollar-for-dollar." *First Federal Savings & Loan Ass'n, supra* at 706, fn 5 and 6. This Court did not address "value in use" at all.[8]

Although the Court of Appeals in *First Federal Savings & Loan* misapplied the special purpose appraisal treatment, it remains a viable valuation method. The *Appraisal of Real Estate* continues to recognize the method: "The highest and best use of special-purpose property as improved is probably the continuation of its current use if that use remains viable and there is

---

[6] The bulk of cases cited by the Court of Appeals in *First Federal Savings & Loan* concerned special purpose designations and value.

[7] "We don't hold that the income approach advocated by First Federal's appraiser should govern, nor do we fault the city's appraiser or the Tax Tribunal for *considering* historical cost. Rather, we reject the notion that it is proper to include, in determining value, expenditures made, as the Tax Tribunal found, to enhance plaintiff's image and business without regard to whether they add value to the selling price of the building." *First Federal Savings & Loan Ass'n,* 415 Mich at 706.

[8] Though "value in use" was discussed in the Court of Appeals decision in *First Federal Savings & Loan Ass'n,* this Court did not address "value in use" and remanded the case on other grounds. The City contends that the remand rendered the Court of Appeal's discussion of "value in use" irrelevant.

sufficient market demand for that use." *Appraisal of Real Estate*, p. 355.[9] The cost approach is an appropriate method for determining the market value of special purpose property. *Appraisal of Real Estate*, p. 566. Michigan courts have likewise recognized that this approach to valuing special purpose property remains viable. *See, e.g., Detroit Lions Inc v City of Dearborn*, 302 Mich App 676, 699; 840 NW2d 168 (2013); *Yoplait USA-General Mills v City of Reed City*, 26 MTT 494, 512-513, MTT Dk No 455313 (2015) **(Exhibit B)**; Thorpe, Zhang, Mao, *What's So Special About Special-Purpose Property*, Appraisal Journal, 226 (Summer 2015; summarizing the appraisal profession's treatment of limited market property and special purpose property).

Here, Menard's property is not a "special purpose" property under *First Federal Savings & Loan*. However, the underyling principle applies not only to special purpose properties, but also to limited market properties and properties lacking reliance comparable sales data, for which the cost-less-depreciation approach is an appropriate valuation methodology.

C. The cost-less-depreciation approach is appropriate when there is a limited market.

The three methods of value, including the cost-less-depreciation approach, are used to reconcile, weigh and account for all aspects in the property subject to valuation. *Meadlowlanes Dividend Housing Ass'n, supra.* Consistent with *Meadlowlanes*, standard appraisal practice relies on the cost-less-depreciation approach not only when a market of sales is lacking, but also in an active market when the *comparable* market information is lacking and sales data is unclear, unreliable or speculative. *See, e.g., Cleveland-Cliffs Iron Co v Republic Twp*, 196 Mich 189, 199; 163 NW 90 (1917); *22 Charlotte, Inc v City of Detroit*, 294 Mich 275; 293 NW 647 (1940);

[9] Examples of special purpose structures include houses of worship, theaters, greenhouses, schools, rail and transportation facilities, sports arenas, other specially designed and constructed building. *Appraisal of Real Estate, 269-270.*

Fisher-New Center, 380 Mich at 340; *Pantlind Hotel Co v State Tax Comm'n*, 3 Mich App 170; 141 NW2d 699 (1966). As the *Appraisal of Real Estate* explains,

> In any market, the value of a building can be related to its cost. **The cost approach is particularly important when a lack of market activity limits the usefulness of the sales comparison approach** and when the property to be appraised–e.g., a one-unit residence–is not amenable to valuation by the income capitalization approach. Because cost and market value are usually more closely related when properties are new, the cost approach is important in estimating the market value of new or relatively new construction. *Appraisal of Real Estate* (14th ed.), p. 566 (emphasis added).

Here, the Tribunal was presented with exactly such a case where comparable market information was lacking and sales data was unclear, unreliable, or speculative. The record was devoid of any comparable sales of free-standing big box retail stores as originally constructed. There was no proven market for big box stores, and even if such sales existed, there was no adjustment to the sales prices to reflect the cost of conversion. Menard's property was newly acquired and its improvements newly constructed. Under these facts, the use of the cost approach should have been considered as a valuation method under *Clark Equipment* ***Error! Bookmark not defined.***, *First Federal Savings & Loan, Meadowlanes*, and the *Appraisal of Real Estate*. The Tribunal's contrary decision was error, and the Court of Appeals correctly remanded the matter.

D. Menard failed to properly apply the cost-less-depreciation approach.

As this Court recognized in *Meadlowlanes*, it is appropriate to use the cost approach to test, reconcile, and weigh the results of the sales comparison approach. Comparable sales are adjusted based on the four-part "highest and best use" analysis for the subject property. *Appraisal of Real Estate*, p. 391[10]; *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676,

[10] "The sequence in which adjustments are applied in the comparable sales is determined by the market data and the appraiser's analysis of that data. …The five categories of property

697; 840 NW2d 168 (2013). An important step in the highest and best use analysis is the evaluation of the financial feasibility of each physically possible and legally permissible use – that is, whether the property will generate income sufficient to support a particular use. The test of financial feasibility is a cost analysis of any modifications. *See Edward Rose, supra.* To be considered a financially feasible use, changes or modifications to the existing use must add as much value as would the cost to renovate or alter the property for the alternative use. *Appraisal of Real Estate,* p. 346-347. Because of these costs,[11] the current use is frequently the market's determination of highest and best use. *Id.* The *Appraisal of Real Estate* explains this financial feasibility analysis as follows:

> The cost approach is especially useful when building additions or renovations are being considered, which is a key issue in highest and best use analysis. The approach can be used to estimate whether the cost of an improvement, including an entrepreneurial incentive, will be recovered through an increased income stream or in the anticipated sale price. The analysis of feasibility rent can help identify and prevent the construction of overimprovements. *Appraisal of Real Estate,* 566
>
> * * *
>
> A proposed development is considered financially feasible when market value exceeds total building and development costs plus a reasonable, market-supported estimate of entrepreneurial incentive (i.e., the anticipated profit necessary for an entrepreneur to proceed with the project). *Appraisal of Real Estate,* p. 567.

The financial feasibility inquiry provides the analytical framework to determine what, if any, adjustments should be made to comparable sales or to determine and calculate functional obsolescence.

In this case, Menard used the cost approach solely to determine that other alternative uses were not financially feasible or were not consistent with the highest and best use of the newly-

---

adjustments ….correspond to the criteria of highest and best use: … financial feasibility – economic characteristics and non-realty components that influence the value of the real property." *Appraisal of Real Estate*, p. 391.

[11] The costs may "not necessarily add dollar to dollar to the usual selling price" of the comparable sale. *First Federal Savings and Loan, supra* at 706, fn 6.

built Menard store. That conclusion is supported in Menard's identification of the likely user-purchasers of this property to be Home Depot or Lowes.[12] *HT 189.* Neither Menard or the Tribunal identified any item of obsolescence that these purchasers would face if they acquired the subject property. No amount of obsolescence was suggested. As the Court of Appeals recognized in its decision, none of the proposed sales were comparable to this standard: two strip malls, three factories, one city hall. They were all modified and likely rezoned. As well, the prospective purchaser-users -- Home Depot, Lowes, Wal-Mart -- were not factories, city governments, or investors in strip malls.

Modifications after the sale to bring property to its highest and best use require *positive adjustments* to the comparable sale prices to account for the modifications. *Appraisal of Real Estate,* 412-414. Menard not only misinterprets *First Federal Savings & Loan Ass'n* to require the sales comparison approach but would misapply the case and require that modifications after sales of suggested comparable property *not* be valued.

A second conclusion can be drawn from the Tribunal's record. If Menard and the Tribunal found it not necessary to make adjustments in the sales comparison approach for after-sale modifications, it would also be consistent to find that no functional obsolescence exists. The finding that no obsolescence exists is not only a matter of proof, for which Menard failed to bear the burden of presenting evidence, but also underscores that functional obsolescence may not exist when the improvements are nearly new and the purchasers (Lowes, Home Depot, Wal-Mart, etc.) would build similar properties, in a growing and flourishing commercial corridor.

[12] Menard: Okay. Can you think of anyone other than a Menards, a Home Depot or a Lowe's that would use that type of building?
City Assessor: Those are great examples of people that would use that building.
Menard: Can you think of anyone else that would use it?
City Assessor: …Wal-Mart or maybe another…home goods sale.

Meijer Stores Ltd Partnership v Franklin Cty. Bd. Of Rev.,122 Ohio St. 3d 447 (2009)[13] **(Exhibit C)**; *Meadlowlanes*, 437 Mich at 503; *Teledyne*, 145 Mich App at 755-756; *Forest Hills Co-operative*, 305 Mich App at 591-593. Thus, rather than using the cost approach to determine what, if any, adjustments should be made to comparable sales or to determine and calculate functional obsolescence, Menard misconstrued and misapplied the cost approach, and the Tribunal erred by relying on Menard's flawed valuation theory. The Court of Appeals was correct in reversing the Tribunal's decision and remanding the matter for further proceedings.

[13] *Longtime U.P. grocery store to close as Meijer moves in.*, www.mlive.com/news/grand-rapids/index.ssf/2017/03/longtime_up_grocery_to_close_a.html **(Exhibit D).**

CONCLUSION

For these reasons, Appellee City of Escanaba requests that this Court deny leave to appeal or, alternatively, affirm the decision of the Court of Appeals in favor of the City.

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Respondent/Appellee,
the City of Escanaba

March 15, 2017

By: */s/ Jack L. Van Coevering*
Jack L. Van Coevering (P40874)
Laura J. Genovich (P72278)
1700 East Beltline Avenue, NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200

83636:00002:3038729-3